STATE OF MICHIGAN

COURT OF APPEALS

ROBERT CULP,

Plaintiff-Appellant,

v.

May 10, 1994

WISMER & BECKER,

Defendant-Appellant Case Nos.

and 148406

MICHIGAN BOILER and THE 161286

SECOND INJURY FUND, et al. 1991 WCAB 480

Defendants-Appellees.

_____/

Before: Hood, P. J. and R. J. Danhof* and Jeanne Stempien**

*Former Court of Appeals Judge, sitting by assignment.
**Circuit Judge sitting by assignment.

PER CURIAM

In Docket No. 148406, Plaintiff appeals by leave granted from a decision by the Workers' Compensation Appeal Board (WCAB) modifying the decision of the hearing referee by finding partial disability. In Docket No. 161286, Defendant, Wismer & Becker (Wismer) appeal granted, after remand from the Michigan Supreme Court to this court for consideration, from the WCAB decision to impose liability for Plaintiff's disability upon it as Plaintiff's last employer. We affirm, but remand for further proceedings.

Plaintiff worked as a millwright for numerous employers over the years. Although the job was considered skilled employment, it also required Plaintiff to climb ladders, lift and carry heavy items and engage in generally

strenuous labor. Plaintiff first sustained a serious injury to his legs and feet in 1962 and was off work for eighteen months, but returned and worked in millwright positions.

After a brief career selling real estate, Plaintiff returned to millwright work in late 1977 and worked for various employers. Plaintiff last worked in a millwright position as a union steward for Wismer. On August 6, 1980, Plaintiff struck his knee against a motor while performing an inspection. Although he lost no time from work, Plaintiff left the job in October 1980 because he could not walk one and one half blocks from the parking lot to the work site.

Plaintiff's initial petition, which was received by the Bureau on December 10, 1982, asserted injury dates of summer 1962, January 9, 1976, June 21, 1979, and August 6, 1980, and claimed total and permanent disability due

to industrial loss of use of both legs. An amended petition, filed in September 1983 alleged additional dates of injuries and named additional dates of injuries and named additional employers. By the date of trial, March 21, 1985, 17 employers and the Second Injury Fund (total and permanent disability provisions) had been named as defendants.

In a decision mailed on October 16, 1985, the hearing referee found that Plaintiff had established a personal injury when he struck his left knee in 1980 while working for Wismer and that he was totally disabled. The referee ordered Wismer to pay benefits at the weekly rate of $176. Although the opinion provided that he be entitled to benefits beginning on December 10, 1982, the decision sheet indicated that benefits were to commence on December 10, 1980 pursuant to MCLD 418.3812); MSA 17.237(381)(2).

Plaintiff and Wismer each appealed the decision. In a two to one decisions entered on December 23, 1991, and adjunct panel of the WCAB modified the referee's decision by finding that Plaintiff was only partially disabled from his employment as a millwright and therefore entitled to a percentage of his wage loss.

The majority also concluded that Plaintiff's partial disability could not be attributed to a single event and thus, pursuant to MCL 418,301(1); MSA 17,237(301)(1), his date of injury was the last day worked for Wismer.

Docket No. 148406

This Court's review of a decision by the WCAB is limited. Absent a showing of fraud, findings of fact by the WCAB are conclusive and may not be set aside if they are supported by evidence in the record. Const. Of 1963,

art 6 § 28; MCL 418, 861; MSA 17.237(861). However, this Court may reverse a decision of the WCAB if the WCAB operated within the wrong legal framework or based its decision on erroneous legal reasoning. Flynn v General Motor Corp. 162 Mich App 511,513-514; 413 NW2d 444 (1987).

Plaintiff's first argument that there cannot be a finding of partial disability because MCL 418.361; MSA 17.237(361) "makes earnings after injury an element in a determination of partial disability" is completely without merit. Pursuant to MCL 418,361; MSA 17.237(361), an employer found liable for partial disability benefits is obligated to pay compensation equal to 80% of the difference between the employee's pre-injury average weekly wage and the amount the employee is able to earn after the injury. §361 is relevant only after the WCAB makes a

finding that an employee is partially disabled; however §361 is irrelevant for a finding of partial disability.

Moreover, Plaintiff's assertion that the calculation under §361 could not be made because he has not earned any wages since his last day worked at Wismer is equally without merit. In Sobotka v. Chrysler Corp. (On Reh), (1993), 198 Mich App 455; 499 NW2d 777 (1993), lv granted 443 Mich 869 (1993), this Court held that a determination of partial disability must include a calculation of the proportionate impairment in the claimant's wage-earning capacity. The fact that the claimant may not have found post-injury

employment is not controlling. Id., p462. 1

The WCAB should have set a partial disability rate pursuant to §361 in light of its finding that the was partially disabled. Accordingly, this case is remanded to the WCAB so that the calculation required by §361 and Sobotka may be made.

1 Although full benefits must be paid if the claimant is found to be totally disabled in skilled employment, but only partially disabled with respect to other employment, id p462, the WCAB did not find that Plaintiff was totally disabled in his employment as a millwright which is a skilled trade.

Plaintiff also contends that the WCAB erred by holding that the benefits should commence on December 10, 1982. We agree. MCL 418.381(2); MSA 17.237(381)(2), provides;

> Except as provided in subsection (3), if any compensation is sought under this act, payment shall not be made for any period earlier than 2 years immediately preceding the date on which the employee filed an application for hearing with the bureau.

The Bureau received Plaintiff's original petition on December 10, 1980.

Docket No. 161286

Wismer argues that the WCAB erred by imposing liability for Plaintiff's partial disability upon them as his last employer pursuant to

MCL 418,301(1); MSA 17.237(301)(1) provides in relevant part;

> Time of injury or date of injury as used in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subject to the conditions that resulted in the employee's disability or death.

The evidence showed that Plaintiff suffered an initial injury in 1962 and various other injuries over the course of the years at different places of employment. The evidence also showed that the work Plaintiff performed

after his initial injury aggravated his condition. Regarding application of §301(1), the WCAB majority stated:

> We are not willing to accept defendant Wismer & Becker's allegation that Plaintiff's last injury, the knocking of the knee against the motor, temporarily exacerbated Plaintiff's knee symptoms and did not increase his underlying pathology. Rather, we find that Plaintiff sustained a number of problems with his physical condition over the years and that whether or not the last knocking of knee on the motor caused the problem is undeterminable.
>
> As such, we find the language of Section 301(1) applicable in that Plaintiff's partial disability cannot be attributable to one single event and thus, his last day of work for defendant Wismer & Becker applies.

The evidence supported the WCAB's finding that Plaintiff's work for Wismer aggravated his condition and contributed to his disability,

although the underlying cause was not determinable. Accordingly, the WCAB properly applied §301(1) in determining that Plaintiff's date of injury was his last day of work for Wismer.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Robert J. Danhof

/s/ Jeanne Stempien

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ROBERT CULP, C.A. No. 94-CV-60018-AA

Plaintiff HON. GEORGE LA PLATA

vs.

HAROLD HOOD, et. al.,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND MOOTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On January 19, 1994, Plaintiff, Robert Culp, filed this complaint pursuant to 42 U.S.C. §1983 against over thirty Defendants

including three state judges. The only remaining Defendants are Judges Harold Hood, Robert Danhof and Jeanne Stempien, 1 (Collective "Judges" or "panel").2

In his Complaint, Plaintiff asks this Court to enjoin the panel of the Michigan Court of Appeals from rendering a decision in an action pending before it. The pending consolidated appeals arise from an order of the Workers' Compensation Appeal Board finding Plaintiff to be partially disabled under the Workers' Compensation Act. 3

---

1 Wayne County Circuit Court Judge sitting by designation.

2 Because a party charged with a deprivation under 42 U.S.C. §1983 must be a person who may fairly be said to be a state actor, the Defendants who are not state actors were dismissed. By way of stipulation, Gary Calkins, Fund Administrator was dismissed from this action February 28, 1994.

3 See Court of Appeals Case Nos.148406 and 161286.

Also, Plaintiff asks for a judgment declaring that the "failures, actions and practices alleged above are a denial to Plaintiff of his federal rights protected by Amendments I, V, and XIV of the Constitution of the United States and by Civil Rights Acts enacted by Congress of the United States and in particular deny to Plaintiff equal protection of the law, due process of law and freedom of expression, and a meaningful petition to the judicial branch of state government..." Although not properly filed, the Court will consider Plaintiff's First Amended Complaint and incorporate into it Plaintiff's originally filed complaint.

The Judges have set forth numerous arguments in support of their Motion to Dismiss or for Summary Judgment. Because it is dispositive, the Court need only consider

the issue of judicial immunity.

With few exceptions, judicial immunity is an immunity from suit, not just from the ultimate assessment of damages.4

Two exceptions exist to this established rule. First, a judge is not immune from liability for nonjudicial actions and second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. 5

In the instant case, neither exception applies, and thus the three Judges are entitled to judicial immunity from this suit. Accordingly,

---

4 Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985).

5 See, Mireles v. WACO, 112 S.Ct. 286, 288 (1991).

Defendants' Motion to Dismiss or for Summary Judgement is GRANTED and Plaintiff's Motion for Summary Judgment is MOOTED.

Plaintiff's Complaint is DISMISSED with prejudice.6

September 8, 1994

George La Plata

Ann Arbor, Michigan

U.S. District Judge

---

6 Even if the Judges were not protected by immunity, Plaintiff has failed to allege a cognizable constitutional claim. In

the instant case Plaintiff claims that because the Court of Appeals limited the scope of review of his worker's compensation claim, his rights protected by the I, V, and XIV Amendment of the Constitution have been violated. Specifically, the decision denied Plaintiff due process of law and freedom of expression and meaningful petition to the judicial branch of state government.

M.C.L.A. §418.861, of the Worker's Disability Compensation Act, provides that:

> "The court of appeals and the supreme court shall have power to review questions of law involved in any final order of the board, Application is made by the aggrieved party within 30 days after such order by any method permissible under the rules of the court of the laws of this state."

Although this Michigan Constitution Art. 6, §28 provides for "direct review" of Workmen's Compensation Appeal Board decisions, it is well settled that leave to appeal may be required by court rule. (See, People v. Martin, 229 N.W.2d 809 (1975) and Evans v. United States, 152 N. W.2d 641 (1967)). Rule 7.203 (B) (3) of the Michigan Court Rules of 1985 which governs the jurisdiction of the Court of Appeals in fact requires leave to appeal. Specifically, the rule states that the court may grant leave to appeal from a final order of an administrative agency or tribunal which by law is appealable to or reviewable by the Court of Appeals or the Supreme Court. Because M.C.L.A . §418.861 does not establish an appeal as of right to the Court of Appeals , rather grants the Court of Appeals and the Supreme Court "power to review" a final order of the Workman's Compensation Review Board ("WCAB"), M.C.R.

7.203 (B) (3) is applicable. Thus, leave to appeal must first be sought.

In light of the above discussion, it must be concluded that Plaintiff did not have a right to appeal. Because Plaintiff did not have a right to appeal the decision of the WCAB, it cannot be said that denial of appeal can violate any of the Plaintiff's constitutional rights.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ROBERT CULP, C.A. No. 94-CV-60018-AA

Plaintiff HON. GEORGE LA PLATA

vs.

HAROLD HOOD, et. al.,

Defendants.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On September 8, 1994, this Court entered an order dismissing Plaintiff's Complaint. Plaintiff now brings this motion for reconsideration of the Court's decision.

Local Rules of the United States District

Court for the Eastern District of Michigan specifically rule 7.1 (h) sets forth the basis upon which a motion for reconsideration may be granted. The rule provides in pertinent part:

> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Following a review of the record and the applicable law, the Court concludes that its decision was just and proper.

Accordingly, Plaintiff's Motion for Reconsideration is DENIED.

October 27, 1994 George La Plata
Ann Arbor, Michigan U. S. District Judge

NOT RECOMMENDED FOR PUBLICATION

No. 94-2334

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED MARCH 19, 1996

LEONARD GREEN CLERK

ROBERT CULP

Plaintiff-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

v.

HAROLD HOOD and ROBERT J. DANHOF, (Retired) Judges of the Michigan Court of Appeals and JEANNE STEMPIEN, Wayne Circuit Judge and Acting Michigan Court of Appeals Judge,

Defendants-Appellees.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if decision is reproduced.

BEFORE: JONES and BOGGS, Circuit Judges, and COFFMAN, District Judge.*

Plaintiff Robert Culp appeals the district court's dismissal of his civil rights action brought under 42 U.S.C. § 1983. We dismiss this appeal as moot.

Culp filed suit in district court, seeking a preliminary injunction to enjoin Defendants, a panel of Michigan Court of Appeals judges, from rendering a decision on his pending workers' compensation appeal.

*The Honorable Jennifer B. Coffman, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

Culp alleged the Michigan Court of Appeals violated his First Amendment rights to free expression and meaningful access to the courts, his Fourteenth Amendment right to equal protection, and his Fifth and Fourteenth Amendment rights to due process of law by limiting the scope of his appeal. The Defendants move the court to dismiss Culp's claim or in the alternative for summary judgment. Culp subsequently amended his complaint to add a section 1983 claim alleging violations of the above mentioned constitutional rights and again seeking injunctive relief.

On September 8, 1994, the district court dismissed Culp's complaint with prejudice and in the alternative granted Defendant's motion for summary judgment. J.A. at 147. This appeal followed.

In his request for relief, Culp petitioned the district court to stay the proceedings in the Michigan Court of Appeals until section 1983 claims could be resolved by the district court. At the time of the district court's order, Culp's claim was pending before the Michigan Court of Appeals. In the meanwhile, however, the Michigan Court of Appeals has entered final judgment on Culp's workers' compensation appeal, and the Supreme Court of Michigan has denied review. Likewise, Culp's petition for certiorari to the United States Supreme Court from the Michigan Supreme Court's denial of a by-pass appeal to challenge the Court of Appeals' limitations on Culp's appeal has also been terminated. On May 15, 1995, the United States Supreme Court denied review. *See Culp v. Wismer & Becker*, 115 S. Ct. 2635 (1995).

Because Culp no longer has claims pending

before the Michigan courts, we must dismiss this appeal as moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v McCormack*, 395 U.S. 486, 496 (1969). The doctrine of mootness requires that litigation have continuing vitality, even throughout the course of appellate review. *Kremens v. Bartley*, 431 U.S. 119, 129 (1977). Jurisdiction, even if once acquired, may abate if interim relief or events resolve all issues in the litigation. *International Union of Automobile Workers v. Dana Corp.*, 697 F.2d 718, 720 (6th Cir. 1983).

As relief, Culp sought an injunction staying the resolution of his workers' compensation claims in the Michigan Court of Appeals. At the time of this writing, Culp's claims have been fully resolved, and there are no proceedings pending in the Michigan Court

system. We hold that this controversy is no longer live and conclude that this court lacks jurisdiction to hear this appeal.

This appeal is **DISMISSED** as moot.

NOT RECOMMENDED FOR PUBLICATION

No. 94-2334

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED JUNE 27, 1996

LEONARD GREEN CLERK

ROBERT CULP

Plaintiff-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

v.

HAROLD HOOD and ROBERT J. DANHOF, (Retired) Judges of the Michigan Court of Appeals and JEANNE STEMPIEN, Wayne Circuit Judge and Acting Michigan Court of Appeals Judge,

Defendants-Appellees.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if decision is reproduced.

BEFORE: JONES and BOGGS, Circuit Judges, and COFFMAN, District Judge.*

PER CURIAM.

Plaintiff Robert Culp appeals the district court's dismissal of his civil rights action brought under 42 U.S.C. § 1983. We dismiss this appeal as moot.

Culp filed suit in district court, seeking a preliminary injunction to enjoin

*The Honorable Jennifer B. Coffman, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

Defendants, a panel of Michigan Court of Appeals judges, from rendering a decision on his pending workers' compensation appeal. Culp also sought declaratory relief in the form of a judgment declaring that the Michigan Court of Appeals's decision to limit the scope of his appeal violated certain of his constitutional rights. Culp alleged the Michigan Court of Appeals violated his First Amendment rights to free expression and meaningful access to the courts, his Fourteenth Amendment right to equal protection, and his Fifth and Fourteenth Amendment rights to due process of law by limiting the scope of his appeal. The Defendants move the court to dismiss Culp's claim or in the alternative for summary judgment. Culp subsequently amended his complaint to add a section 1983 claim alleging violations of the above mentioned

constitutional rights and again seeking injunctive and declaratory relief.

On September 8, 1994, the district court dismissed Culp's complaint with prejudice and in the alternative granted Defendant's motion for summary judgment. J.A. at 147. This appeal followed.

In his request for relief, Culp petitioned the district court to stay the proceedings in the Michigan Court of Appeals until section 1983 claims could be resolved by the district court and to declare that a limitation on the scope of Culp's appeal violated his constitutional rights. At the time of the district court's order, Culp's claim was pending before the Michigan Court of Appeals. In the meanwhile, however, the Michigan Court of Appeals has entered final judgment on Culp's workers' compensation appeal, and the Supreme Court of Michigan has

denied review. The United States Supreme Court has also declined to review the Michigan Court of Appeals decision. *See Culp v. Wismer & Becker*, 115 S. Ct. 2635 (1995).

Because Culp no longer has claims pending before the Michigan courts, we must dismiss this appeal as moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v McCormack*, 395 U.S. 486, 496 (1969). The doctrine of mootness requires that litigation have continuing vitality, even throughout the course of appellate review. *Kremens v. Bartley*, 431 U.S. 119, 129 (1977). Jurisdiction, even if once acquired, may abate if interim relief or events resolve all issues in the litigation. *International Union of Automobile Workers v. Dana Corp.*, 697 F.2d 718, 720 (6th Cir. 1983).

As relief, Culp sought an injunction staying the resolution of his workers' compensation claims in the Michigan Court of Appeals. At the time of this writing, Culp's claims have been fully resolved, and there are no proceedings pending in the Michigan Court system. We hold that this controversy is no longer live and conclude that this court lacks jurisdiction to hear this appeal.

This appeal is **DISMISSED** as moot.

No. 94-2334

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED: JULY 30, 1996
LEONARD GREEN, CLERK

ROBERT CULP,

Plaintiff-Appellant,

v.

HAROLD HOOD, ET. AL.,

Defendants-Appellees.

BEFORE: JONES and BOGGS, Circuit Judges; and COFFMAN,* District Judge.

*The Honorable Jennifer B. Coffman, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further review the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk